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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions	)	MM Docket No. 92-264

COMMENTS OF COLE, RAYWID & BRAVERMAN

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SUMMARY OF COMMENTS

Section 617 prohibits only "a cable operator" from transferring an ownership interest in a cable television system within three years of acquisition or initial construction. The statute does not prohibit one who possesses a non-attributable interest from transferring such an interest within the three year period, because such a party would not be a cable operator.

The broadcast transfer of control standard provides the appropriate definition of transfers that are subject to the three year holding period restrictions. The broadcast standard effectuates the intent of Congress in enacting Section 617, because transfers that might lead to "profiteering" or might otherwise cause undue pressure on subscriber rates would be prohibited. The use of the broadcast standard also brings much needed certainty to the implementation of Section 617, and allows parties to refer to a well-developed body of existing law. Adoption of the broadcast transfer of control standard will allow transfers of interest that do not threaten to affect services or rates to proceed.

For purposes of the three year holding period, "acquisition" must be the later of the closing date or effective date of a transfer or assignment. Only then is the new operator able to control rates and services. "Initial construction" should be the date a system is activated for initial CLI testing.

Application of Section 617 in the context of MSO's presents special problems. Section 617 is not intended to unreasonably restrict cable system transfers by MSO's. As a general matter, the transfer of equity in a MSO will not implicate the policies of the statute. An MSO should only be restricted from being transferred to a third party when the MSO has acquired or initially constructed cable systems serving 50% or more of the MSO's total subscribers within three years. If 50% or more of an MSO's subscribers have been served for more than three years, the transfer is analogous to the single majority shareholder attribution rule, and should be permitted.

The exceptions to Section 617 include an exclusion for subsequent spinoffs from a multi-system sale. The "terms of the sale" require a subsequent spinoff not only when the literal terms of an assignment or purchase and sale agreement specify a subsequent transfer, but also when a purchaser has a demonstrable intent under all the terms of the sale subsequently to transfer systems serving less than 50% of the total subscribers transferred in the initial transaction.

The exception for "tax free" transfers applies at minimum, to sales in which there is no gain or a loss. The exception also applies to transactions involving tax certificates, and other transactions commonly referred to as "tax free" under the Internal Revenue Code. The availability of the exception is not affected by the existence of some related payment of cash or other taxable consideration to adjust the value of ownership interests. So long as the transaction qualifies for preferential "tax free" Internal Revenue Code treatment, the exception for transfer "not subject to federal income tax liability" applies.

The exception for sales required by law does not provide any additional or independent basis for a franchising authority to order the sale of a cable television system. Instead, the statute simply allows transfers that are "required by operation of any law or any act" of any government or agency thereof to proceed without antitrafficking restrictions. This includes court-directed or approved sales or transfers (such as bankruptcy), sales or transfers that follow the death of a cable operator, FCC-order divestiture and any other legally-required transfer.

The exception for transfers between affiliated entities follows the Commission's existing rules for the pro forma transfer of broadcast licenses. The legislative history of Section 617 indicates that systems affiliated through management control are also exempt from the three year holding period. A transfer to an affiliated entity does not trigger a new three year holding period.

The FCC should assert primary jurisdiction over the interpretation and enforcement of the anti-trafficking provision. Section 617 is intended to address a perceived national problem, and must be administered on a national basis. The statute and its legislative history indicate that the FCC has primary jurisdiction. Only the Commission has waiver authority, and the House Report specifies that Section 617 does not expand the ability of any franchising authority to restrict a transfer.

Section 617 should be enforced like existing cross-ownership rules, through the due diligence of parties to a transaction. If the Commission desires an administrative opportunity for review, the cable operator could include a statement of compliance with its post-closing notice under FCC Rule 76.12. This limits FCC involvement in most transfers, and protects cable operators and potential buyers from those franchise authorities that might abuse the transfer process.

Congress imposed a 120 day time limit for authorities to approve transfer requests. This limit applies to requests for approval that are accompanied by information required in accordance with FCC rules. The FCC is to define the type of information that must be provided. If a franchise does not require franchising authority approval of a transfer, the cable operator has no obligation to provide any documentation to the franchise authority. Section 617 does not expand existing local power to review transfers.

Congress intended to give the Commission general waiver authority to serve the public interest, and specified that waivers should be granted in appropriate cases of default, foreclosure or financial distress. The specific examples of waiver in the statute are merely illustrations of specific situations where the concerns of Congress over profiteering are clearly not implicated. Congress did not intend to limit the Commission's general waiver authority in any way. General FCC waiver authority is required because it is impossible to incorporate into any rule all potential circumstances in which a waiver would serve the public interest. The Commission must issue waivers contingent upon ultimate franchising authority approval. This is the only method that serves the practical needs of parties to a transaction, and does not in any way undermine the existing power of a franchising authority to ultimately approve a transfer.

The Commission's general forfeiture procedures provide a satisfactory remedy for willful violations to Section 617. Good faith violations of the rule, however, should not be penalized. Neither should such transactions be undone.

The Commission's existing cable/MMDS cross-ownership prohibition generally satisfies the provisions of Section 11 of the 1992 Cable Act. Only existing cable/MMDS interests should be grandfathered. No reporting requirement is necessary to monitor the cable/MMDS/SMATV cross-ownership prohibition.

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COMMENTS OF COLE, RAYWID & BRAVERMAN

The law firm of Cole, Raywid & Braverman ("CR&B"), hereby submits its comments on the Commission's December 28, 1992 Notice of Proposed Rulemaking, FCC 92-542 ("NPRM") in the captioned proceeding. CR&B files these comments on behalf of those cable television operators and those state and regional cable television associations listed below.[1/] The comments address only those aspects of the NPRM concerning the anti-trafficking and cross-ownership provisions of the 1992 Cable Act.

1/ The following parties are participating in these comments: Acton Cable Partnership; Jones Intercable, Inc.; Century Communications Corp.; TeleCable Corporation; KBLCOM, Inc.; Columbia International, Inc.; Western Communications, Inc.; Greater Media, Inc.; Helicon Corp.; Monmouth Cablevision Assoc.; Allen's Television Cable Service, Inc.; Frederick Cablevision, Inc.; Gilmer Cable Television Company, Inc.; Grassroots Cable System; Halcyon Group, Inc.; OCB Cablevision, Inc.; United Video Cablevision, Inc.; Zylstra Communications Corporation; Cable Television Association of Maryland, Delaware and District of Columbia; New Jersey Cable Television Association; Tennessee Cable TV Association; Texas Cable TV Association; West Virginia Cable Television Association

I. ANTI-TRAFFICKING

Section 13 of the 1992 Cable Act, Pub. L. No. 102-385, 106 Stat. 1489 (1992), amends the Communications Act by adding a new Section 617, which establishes a three year holding period for cable systems. The legislative history indicates that the three year holding period is intended to eliminate "profiteering transactions" which might "appear adversely to effect cable television rates or service in the communities served by the transferred cable system." H.R. Rep. No. 628, 102d Cong., 2d Sess. 119 (1992) ("House Report"). The FCC, General Accounting Office and Federal Trade Commission determined that there was little, if any, correlation between the sale of cable systems and higher rates. See Competition, Rate Derequlation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 F.C.C. Rcd. 4962, 4982-83 (1990) (annual increase in rates for systems sold versus those not sold "when expressed as a percentage of the preceding year's rates, were comparable."); General Accounting Office, Telecommunications: Follow-Up National Survey of Cable Television Rates and Services (June 1990) at 4-5 ("GAO found no statistically significant pattern of higher [rates] increases in the systems changing ownership"), 22-23 (noting FTC conclusion that changes in ownership are unrelated to rates). Congress nonetheless adopted Section 617.

A. Transfer Of Ownership (NPRM ¶¶ 9-12)

The statutory prohibition on certain transfers applies only to a "cable operator." 47 U.S.C. § 537(a). As a preliminary matter, the statutory use of the term "cable operator" unequivocally excludes a wide variety of transfers of ownership interests from the statutory prohibition. Section 602(5) of the Cable Act (as amended) defines a "cable operator" as any entity that "provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system . . ." 47 U.S.C. § 522(5) (emphasis added). A "significant interest" in a cable system is an interest that is cognizable under the FCC attribution rules.[2/] At minimum, any ownership interest which is non-attributable under the Commission's attribution rules may be freely transferred without regard to the three year holding period.[3/] One who possesses a non-attributable ownership interest in a cable system is not a "cable operator" subject to the restriction of Section 13 of the 1992 Cable Act.

2/ See Cable Franchise Policy and Communications Act of 1984, H.R. Rep. No. 934, 98th Cong., 2d Sess. at 41 (1984); Cable Communications Act Rules, 58 R.R.2d 1, 5 ¶ 6 (1985) (same) (subsequent history omitted); 47 C.F.R. § 73.3555 nn. 2-3 (multiple ownership attribution); 47 C.F.R. § 76.501 (same).

3/ Cable operators are charged with knowledge of the attribution rules in order to comply with the cable/broadcast ownership restrictions. See 47 C.F.R. §76.501.

The Commission correctly notes, however, that "it does not appear that Congress intended the anti-trafficking rule to restrict transfers" of noncontrolling ownership interests which are nevertheless cognizable under the attribution rules. NPRM ¶ 12. Indeed, although the attribution rules were developed to promote the diversity of media voices (through the multiple ownership limitations) while allowing ownership interests that are unlikely to affect the day-to-day operation of the entity's media-related operations, the anti-trafficking rule is intended to eliminate "profiteering" and other transactions which threaten subscriber rates and services. Consequently, the Commission can exclude a broader class of transactions from the anti-trafficking restrictions than would result from application of the attribution rules alone, and still prevent "profiteering".

The broadcast transfer of control standard should define when a "transfer of ownership" is subject to the three year holding period. NPRM ¶12. Cable operators are familiar with a streamlined form of the FCC's broadcast transfer of control standards that apply to licensees of CARS microwave stations. <u>See</u> 47 C.F.R. § 78.35; <u>see</u> <u>also</u> <u>Cable Relay Service</u>, 58 R.R.2d 305, 307 (1985) (explaining that existing Commission standards for transfer of control apply to CARS licenses). Application of the broadcast transfer of control standard to the cable television three-year holding requirement will allow cable operators and the FCC to take advantage of the existing body of law interpreting the "transfer of control" concept in a wide variety of factual contexts (e.g., hostile takeovers, proxy contests, ouster of CEO, etc.). The Commission's cable trafficking rules should have notes that reference examples of basic transfer of control law, just as the definition of a cable system in the 1972 cable rules referenced interpretive case law, see, Cable Television Report and Order, 36 FCC 2d 143 (1972) (adding notes referring to cases), and just as the current attribution rules cite to relevant precedent. See 47 C.F.R. § 73.3555 Note 2(g)(2) (citing Attribution of Ownership), Note 5 (citing report and order in "satellite" station proceeding), Note 7 (citing waiver precedent). This approach would create a much-needed level of certainty for prospective sellers, purchasers and financiers of cable television systems.

The broadcast transfer of control standards would effectuate Congressional intent in establishing the three year holding period. These standards would prohibit transfers of the magnitude that could lead to "profiteering" or otherwise create undue pressure on subscriber rates. On the other hand, the rule would allow transfers that do not permit the acquirer to control corporate decisions, which might adversely affect services or rates.

An alternative to the broadcast transfer of control standard which would establish a fixed transfer of ownership threshold, such as 50% or more of the outstanding equity in a cable system, is unworkable. A standard tied strictly to equity ownership would prohibit many transactions that have no potential ability to adversely affect subscriber services or rates. Moreover, this approach would subject some owners of non-attributable interests to the three year holding period even though they are not "cable operators" under the Cable Act.

B. Calculation Of The Three Year Holding Period (NPRM 14)

1. Acquisition and Construction

"Acquisition" occurs on the later of the closing date or the effective date of a transfer or assignment agreement (by which a "transfer of control" as described above occurs). It is only after this date that the new cable operator is able to control rates and services to cable subscribers. The same logic extends to calculation of the date on which the three year holding period ends. Prior to the closing date or effective date (whichever is later) of an assignment or transfer agreement, the proposed transferee or assignee has no power to control rates or services, and thus may not engage in whatever "activities Congress sought to preclude."

"Initial construction" should be deemed to be the date on which a constructed system is first activated for CLI testing. The dates of those tests are recorded and placed in technical files available for FCC inspection, and are also routinely filed with Form 320. A cable system is activated for testing just before it provides cable service to multiple subscribers, providing a convenient date certain on which a system is "constructed" and subject to the three year holding period.

2. **MSO Transfers** (NPRM ¶ 14)

The anti-trafficking restriction was not meant to prohibit transfers of MSOs. An MSO may transfer any equity, because such transfers do not implicate the policies of the statute.

We also believe that the statute does not require that an MSO satisfy the three year holding period for each and every system it owns, where interests in a number of systems are being transferred. To impose a more stringent standard would lead to absurd results that do nothing to further the Congressional intent behind this provision. For example, if the owners of a cable television system sought to transfer all of the company's stock to a new owner, it would be difficult to find any "profiteering" or other impact on subscriber rates and services if even 15% of the company's subscribers were served by cable systems acquired within three years of the proposed transfer. This type of deal would only occur if it made sense for the buyer to operate some or all of the systems in the current rate-regulated environment. The mere satisfaction of the three year holding period will not determine whether or not the transfer of an MSO's systems will adversely affect subscriber rates.

A separate standard for determining compliance with the anti-trafficking provision is needed for transfers or assignments of MSOs. A rule which prohibits the transfer of an MSO when it has acquired or initially constructed cable systems serving 50% or more of the MSOs total subscribers within three years will harmonize the MSO trafficking rule with the underlying transfer of control standards.4/ If most (50% or more) subscribers have been served for more than three years, the transfer is analogous to the single majority shareholder attribution rule, which provides that the existence of a single majority shareholder renders all other interests non-cognizable. This rule would preclude transfers of a sufficient percentage of subscribers to warrant application of the three year holding period.5/

4/ By analogy where a cable operator operates a system that has been held for more than three years acquires a contiguous system and interconnects the two, the operator should have the benefit of the initial three year holding period, where the newly integrated system constitutes less than 50 percent of the consolidated system's subscribers.

5/ The percentage of subscribers to be transferred which satisfy the three year holding period is the appropriate standard to govern the application of the rule to MSO's, not the percent of franchises or communities that have been held for three years. This is because transfers of multiple systems are ordinarily valued on the basis of revenue, subscriber number, or some combination thereof: the number of franchises held or communities served normally is not relevant to valuation and does not therefore influence rates.

C. Exceptions To The Three Year Holding Period (NPRM ¶¶ 15-18)

1. Exclusion Of Spinoffs From A Multisystem Sale

Section 617(b) of the Cable Act provides for special treatment for certain multiple system sales.[6/] Under this provision, "if the terms of the sale require the buyer to subsequently transfer ownership of one or more such systems to one or more third parties, such transfers shall be considered a part of the initial transaction." In other words, spinoffs from a sale of multiple systems are not subject to the three year holding period.

The ambiguity with this provision lies in the determination of when "the terms of the sale require" a subsequent spinoff. A buyer may purchase a package of systems, even if not interested in running all of them, because the majority of the block of systems are a "good fit" (geographically, technically, demographically, etc.) with the operator's existing systems. But because some small percentage of the systems in the block do not complement the operator's overall business strategy, the operator will seek subsequent buyers of the undesired properties even before the initial multiple system transfer is completed. The buyer may be a

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6/ The NPRM mentions this provision in ¶ 7, but does not raise any specific questions as to its interpretation. CR&B believes that this provision requires the clarifications discussed below.

consortium of cable operators, who may create a partnership for the purpose of purchasing the systems, or who simply work out amongst themselves which systems would go to which consortium members after the purchase. In each of these instances, the literal terms of the assignment or purchase and sale agreement for the initial multiple system transfer do not normally address the subsequent spinoff transactions contemplated by the purchaser(s). Rather, the purchaser (or consortium members) enters into separate commitments to spinoff certain systems to various third parties.

There is perhaps a narrow class of multiple system sales in which the purchase and sale or assignment agreement explicitly mandates subsequent spinoffs to named third parties. Yet such agreements have been at best infrequent. The seller may not agree to any provision for spinoffs in the initial agreement for fear that the deal will become bogged down in the spinoff transactions, or worse, that the spinoffs will falter and kill the deal. However, Commission rules should recognize that the multiple transfer exception will apply where any of the terms of a sale contemplate the resale of certain of the acquired properties to third parties. For example, while the purchase and sale agreement may be silent concerning resales, the purchaser's financing arrangement may contemplate resales. Since financing is part of the "terms of a sale" such provisions should qualify the transaction for this exemption.

Most transactions will not involve specific documentation between buyer and seller, or even with financiers, that can be construed to literally require a resale to third parties. Yet, it is clear that such resales are common, and that the multiple transfer exception was intended to allow such resales to continue. Consequently, if the exception for spinoffs of multiple system transfers is to have any real-world meaning, it must apply to multiple system transfers in which the purchaser has a demonstrable intent under the terms of the sale subsequently to transfer systems serving less than 50% of the total subscribers transferred in the initial transaction to third parties.[7/] This intent to spinoff systems could be demonstrated by (1) a statement of intent in the initial purchase and sale or assignment agreement, (2) through side letters between the purchaser and third parties, or among the members of a purchasing consortium, or (3) similar evidence of intent. Of course, to the extent that the specific terms of an initial purchase and sale agreement or financing agreement requires resales, such resales could occur without limitation under this exception.

7/ Once again, the 50% benchmark conforms the exception for spinoffs with the attribution rules, under which the existence of a single majority shareholder means that all other interests are not recognized. By analogy, the retention of 50% or more of the total subscribers renders non-cognizable the subscribers subsequently sold "by the terms of the sale."

2. <u>**"Tax-Free" Transfers**</u> (NPRM ¶15)

The first exception listed under Section 617(c) is for "any transfer of ownership interest in any cable system which is not subject to Federal income tax liability." On a most fundamental level, this exception must apply to sales in which there is no taxable gain, or in which the seller has a loss. Such transactions fall squarely within the terms of the statutory exception.

CR&B agrees that this exception also applies to "transactions involving tax certificates issued by the Commission pursuant to Section 1071 of the Internal Revenue Code ("Code"), which allow deferral of gains taxes for businesses acquired by minorities." The transaction is not subject to Federal income tax liability at the time it occurs, but the gain is taxed upon some later taxable disposition.

For the same reason, CR&B agrees that the exception applies to "tax free" exchanges of assets under Section 1031 of the Code and "tax free" reorganizations under Section 368 of the Code. As with transactions involving minority tax certificates, in these transactions, the seller is essentially allowed to defer gain recognition and tax until a future date.

Three similar transfers of ownership interests in cable systems are eligible for deferred recognition of gain under the Code: (i) a "tax free" capital contribution (in the form of a cable system or ownership interest therein) to a corporation or a partnership pursuant to Section 351 or Section 721 of the Code; (ii) a "tax free" distribution by a corporation to its shareholders pursuant to Section 355 of the Code; or (iii) a "tax free" distribution by a partnership to its partners pursuant to Section 731 of the Code.

Each of these forms of tax free transfers is eligible for the preferential treatment under the Code even though they may involve some partial recognition of gain for "boot." Boot is the payment of consideration (usually cash) to equalize the value of assets in a like-kind exchange of assets, or to otherwise raise the value of the exchange of assets to a particular level (for example, the required level of capital contribution to a corporation or partnership).[8/] The existence of boot in a transaction therefore should not affect the availability of the exception. It is extremely rare that systems traded and eligible for deferred recognition of gain under Sections 1031 and 368 of the Code are so close in value that the transaction does not involve some boot. Yet the core transaction qualifies for "tax free" treatment. If the presence of boot in a tax free exchange, capital contribution, or distribution operated to bring the

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8/ Tax free organizations under Section 368, capital contributions under Section 351 and 721, tax free distributions to shareholders under Section 355, and tax free distributions to partners under Section 371 of the Code might, qualify for the exception for transfers from affiliated persons or groups under Section 617(c)(3) of the 1992 Act in some circumstances, but not all. *See* Section I.C.4. below (discussing exception).

transaction within the three year holding period, the effect would be to render the exception for transfers "not subject to Federal income tax liability" largely meaningless.[9/] The exception must be available for any transaction which qualifies for "tax free" treatment under Sections 1031, 368, 351, 721, 355, or 731 of the Code regardless of the existence of some payment of cash or other taxable consideration to adjust the value of the ownership interests.

3. **Sales Required By Law** (NPRM ¶ 16)

The exception in Section 617(c)(3) for transfers required by law permits a franchising authority to require a sale only in circumstances defined within the franchise agreement. A franchise agreement may contain provisions that call for the revocation of the franchise for material franchise violations that are uncured after notice.[10/] But the exception does not provide any additional or independent basis for a franchising authority to order the sale of a cable television system.

9/ It is not uncommon for tax-free exchanges involving three parties to occur, typically with boot involved to equalize values. Again, each of the transactions in such an arrangement should be exempt.

10/ In those rare instances where a franchise has been revoked or not renewed, the cable operator typically tries to find a buyer for the franchise in order to recoup some of the substantial investment in the physical components of the system. This is what an operator is trying to do with its systems adjacent to Morganton, North Carolina, where its franchise was not renewed after a widely-watched court battle.

Nothing in the statute or legislative history suggests that Congress intended to broaden the power of a franchising authority to mandate a sale of a cable system.[11/] See House Report at 120 (Congress "does not intend . . . [to] expand or restrict the current rights that any franchise authority may have concerning approval of transfers or sales.").

The wording of this statutory exception is broad, and would permit the transfer of a cable system regardless of the three year holding period if "required by operation of any law or any act" of any government or agency thereof. This would include, for example, sales or transfers directed or approved by any court, such as a bankruptcy court (either to or from a trustee or to a third party), sales required by the death of an owner (as provided under generally applicable partnership law),[12/] and divestiture sales required by the FCC multiple and cross-ownership rules.[13/]

11/ With the consent of the operator, a franchisor should be permitted to order sale of a cable property within this exception.

12/ The disposition of cable television interests after the death of a cable operator would be covered by this exception, including the sale of cable systems to third parties if an estate is liquidated.

13/ As with transfers or assignments to an affiliate (see below & NPRM ¶ 17), a transfer to a bankruptcy trustee should not trigger a new three year period, because the trustee is operating under court supervision and is not interested in running the business, but rather in preserving and selling assets.

Municipally owned systems are not exempt from the rule, regardless of the existence of a franchise. These are cable systems, expressly subject to the statutory limitation on transfer. The sale of a system within the three year holding period raises the same concerns, regardless of whether it is a local government which is selling the assets.

4. Transfers Between Affiliated Entities (NPRM ¶ 17)

The exception for transfers between affiliated entities was intended to allow transfers that would be considered *pro forma* as defined in Section 73.3450(f) of the Commission's Rules ("short form transfers"). The House Report demonstrates "that a broad definition of control was intended to apply to this exception." House Report at 119.

In many instances, "tax free" capital contributions that meet the requirements for non-recognition of gain under Sections 351 or 721 of the Internal Revenue Code, and distributions to shareholders or partners that qualify for non-recognition of gain under Sections 355 or 731 of the Code, will fall within this exception. The rationale for these IRS exceptions is that the form of ownership has simply changed from direct to indirect (in transfers of assets for stock or shares) or from indirect to direct (in distributions to stockholders or partners).

Cable systems commonly controlled through management should also be exempt from the three year holding requirement when transferred from one operator to the other. The House Report specifies that the exemption for affiliated entities applies if the purchasing and selling entities are affiliated "by virtue of . . . management control." House Report at 119. This recognizes that one cable system may be operated under a management agreement with another operator, with the managing operator implementing such day to day functions as channel line ups and pricing. A transfer of ownership from one of these entities to the other should be exempt.

A transfer or assignment to an affiliated entity should not trigger a new three year holding period.[14/] NPRM ¶17. Otherwise, the exception would be of limited utility. Cable operators simply do not transfer ownership of cable systems to affiliated entities and persons under circumstances that could be considered "profiteering" by any definition. That would be self-defeating. The acquisition date for purposes of the holding period following a transfer between related entities should be the original date such a system was acquired or constructed by the affiliated transferor or assignor.

14/ The NPRM does not mention assignments in this passage, but the same logic applies.

D. The FCC Should Assert Primary Jurisdiction Over The Interpretation And Enforcement Of The Anti-Trafficking Provision (NPRM ¶¶ 8, 13, 19-23)

1. Jurisdiction

The three year holding period is intended to address a perceived national problem in the "flipping" of cable systems, and requires that the provision be enforced primarily by the FCC on a national basis. Interpretation of the rule will require, at minimum, an understanding of whatever nationally applicable definition of "transfer of control" the Commission adopts, as well as an understanding of the statutory definition of a "cable operator". Under the implementing scheme tentatively proposed in the NPRM, understanding the three year holding period will involve application of the FCC's sometimes complex rules governing broadcast transfers of control. NPRM ¶ 12. We believe the Commission's implementing rules should have notes referring to the basic principles and interpretive cases of the broadcast "transfer of control."15/ Regardless of the eventual

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15/ See, e.g., 47 C.F.R. § 73.3555 Note 2(g)(2), Note 5, Note 7. A note could include references to authority establishing that a transfer of one 50% owner's equity to the other 50% owner is pro forma. Barnes Enterprises, Inc., 55 F.2d 721, 725 n. 4 (1975); Gaffney Broadcasting, Inc., 35 R.R.2d 1607, 1609-10 (1980); Grace Missionary Baptist Church, 48 R.R.2d 129, 135 n. 16 (1980). Other important precedent should likewise be referenced. See, e.g., WWOR-TV, Inc., 69 R.R.2d 1617 (1991) (number of votes that changes hands, not change in number of shareholders, is relevant); WWOR-TV, Inc., 68 R.R.2d 1282 (transfer of control of corporation's assets to new company owned and controlled by same stockholders is

[Footnote Continued Next Page]